

Indiana Board of Special Education Appeals



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In the Matter of N.U. and S.U. and the)
Fort Wayne Community Schools) **Article 7 Hearing No. 988-97**
)

The Students, through their parents, requested a due process hearing. As the result of a prehearing conference, the issues for hearing were determined to be whether feeding the children breakfast without notice to the parents caused the educational program to be inappropriate and whether the way the teacher investigated and reported suspected child abuse resulted in inappropriate conduct by the teacher and a violation of the children's and parents' rights such that the children's educational program was inappropriate. On appeal, the parents challenge several of the Independent Hearing Officer's (IHO) findings of fact or conclusions of law and raise allegations of a due process violations, a conflict of interest on the part of the school and concerns of altered documents.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

The parents requested a due process hearing by letter dated August 13, 1997. Dennis Graft, Esq., was appointed IHO under 511 IAC 7-15-5 on August 18, 1997. The Students were represented by an advocate and the school was represented by legal counsel. The IHO notified the parties of due process rights and procedures for the hearing. A pre-hearing conference was conducted on September 12, 1997. Pursuant to the pre-hearing order of September 16, 1997, the issues for hearing were identified as:

1. Was the 1996-1997 educational program a free appropriate public educational program for the children, specifically, did the teacher's feeding of the children breakfast without any communication or notice to the parents cause the educational program to be inappropriate;
2. Did the way the teacher investigated and reported suspected child abuse result in inappropriate conduct by the teacher and violate the children's and parents' rights so that the children's free, educational program was inappropriate.

In the pre-hearing order, the IHO also set the hearing dates of October 15 and 17, 1997. The parties agreed, and the IHO ordered, that in lieu of closing argument the parties would submit post hearing briefs no later than November 3, 1997. The parties further agreed, and the IHO ordered, that the IHO's decision would be due by November 10, 1997.

A final prehearing conference was conducted prior to the start of the hearing on October 15, 1997. The hearing was conducted over two days, October 15, 1997 and October 17, 1997. Both parties submitted post hearing briefs and the IHO's written decisions were issued on November 10, 1997.¹ The IHO found that the Students were five years old and were early

¹The IHO issued separate written decisions for each of the two students, who are fraternal twins. The decisions are virtually identical, with minor variations concerning early developmental
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childhood development students on a full time basis as of the date of the request for the due process hearing. Due to developmental delays, the Students' mother requested a referral for special education services in 1995. The Students were evaluated and identified as Students with mental handicaps and delays in physical, self-help, social, pre-academic and communication skills. A case conference committee meeting was held on September 25, 1995, at which time the Students were determined to be eligible for special education with a primary disability of moderate mental handicap and a secondary disability of communication disorder. Individualized education programs (IEPs) were developed with special education instruction for the entire instructional day in a general education setting. From October, 1995 to June 1, 1996 the parents concurred in the IEPs.

An annual case review was held on April 18, 1996. The Students remained eligible for special education services and the mother concurred in the IEPs developed for the Students. The Students attended the same early childhood special education class with the same teacher as the prior year. An annual case review was held on April 18, 1997. Again, the Students remained eligible for special education services and the mother concurred with the IEPs developed for the 1997-1998 school year. As of April 18, 1997, the mother had expressed no concerns regarding the Students' early childhood development teacher.

During the 1996-1997 school year the Students' teacher started to observe the Students coming to school with physical injuries or bruises. Six specific instances of bruises or lumps, from November 13, 1996 to May 13, 1997, were found by the IHO. Because both Students told the teacher that their mother had caused the injuries noted on January 14, 1997, the teacher notified the local Office of Family and Children (OFC) of suspected child abuse. The local OFC investigated the January 14, 1997 incident. On May 13, 1997, both Students had bruises and the teacher again notified OFC of alleged abuse. On May 13, 1997 a case manager for the local OFC investigated the alleged abuse and the Students indicated that their father had hit them. The case manager substantiated the abuse and removed the Students from their parents' care and custody, placing both Students in foster care. The case manager did not rely on the teacher's log to substantiate the abuse.

During the 1996-1997 school year, the school sent the parents a notice of eligibility for free text books and meals for the Students. This notice required the parents to notify the school if they did not desire the Students to receive free breakfasts. The parents did not question school officials about the form nor notify the school of their desire that the Students not receive free breakfasts. The Students began receiving free breakfasts at the pre-school during the 1996-1997 school year. The Students apparently never vomited at the pre-school.

Indiana Code 31-6-11-3 sets forth the obligation for reporting suspected child abuse. The Students' teacher complied with all state laws and the school's rules, regulations and policies.

Based upon the foregoing findings, the IHO concluded as follows:

differences and changes in language pertaining to the difference in the sex of each student. For purposes of this written decision, the IHO's two decisions will be treated together as one decision.

1. During the 1996-1997 school year the early childhood development teacher's feeding of the Students breakfast, based upon the parents' notice of the free texts/meals and that the teacher never observed this Students vomit (which negates any necessity to communicate to the parents the providing of free breakfasts to the Students, did not make the Students' educational programs inappropriate.

2. The teacher appropriately reported suspected child abuse when she had reason to believe the Students were victims of abuse.

3. The Students' individualized educational programs for the 1996-1997 school year provided a free appropriate education.

The IHO ordered that the teacher acted appropriately in all relevant matters and the Students' 1996-1997 IEPs, as written and implemented, provided a free appropriate public education.

The IHO advised the parties of their right to appeal and the timelines for doing so.

PROCEDURAL HISTORY OF THE APPEAL

The parents timely filed their Petition for Review on December 9, 1997. The school's response was received on December 19, 1997 by facsimile transmission. On January 5, 1998, the Indiana Board of Special Education Appeals (BSEA) notified the parties that it would conduct its review on January 15, 1998, beginning at 10:00 a.m., but without oral argument and without the presence of the parties. 511 IAC 7-15-6(k). However, the BSEA notified the parties that the review would be tape recorded and a transcript prepared. A copy of the transcript will be sent to the representatives of the parties when available.

Parents' Petition for Review

In their Petition for Review, the parents have alleged due process violations which include a violation of the separation of witnesses order and parental responsibility for court transcripts and sending a copy of their brief to the respondent². The parents also object to the following findings of fact and conclusion of law:

Findings of Fact:

6. From October, 1995 to June 1, 1996 the parents concurred in the IEP. The student attended an early childhood development program with related services of occupational therapy, physical therapy and speech therapy.

²The Petition for Review lacks specificity with regard to these objections. The Petition, in relevant part, states: "It was said at the preliminary hearing that all issues would be addressed. As well that there was separation of witnesses. Never was it discussed that we would be responsible for court transcripts or we would need to send a copy of our brief to the respondent. . . . Furthermore, how could there have been separation of witnesses when all of the witnesses were outside of the room freely discussing the case while waiting to be called in?"

Objection: The parents object to this finding, claiming that the IHO stated that both parents attended all of the conferences while the testimony indicated that only the mother attended these conferences.

11.³ During the 1996-1007 school year the student's early childhood development teacher started to observe the child or her twin brother coming to school with physical injuries or bruises, specifically the teacher observed the following:

- (a) On November 13, 1996 the student had a large bruise on her nose. Her brother said she bumped it on the bed.
- (b) On December 10, 1996 the student's brother had a bruise or lump on his forehead. The student said her father had hit her brother but their mother said he had been hit by his seven year old brother.
- (c) On January 6, 1997 the student's brother had a small, old bruise on his forehead but he would not say who did it or how it happened.
- (d) On January 7, 1997 the student's brother had a small, fresh bruise on his forehead and said a brother had done it.
- (e) On January 14, 1997 the student's brother had a slightly puffy and scratched left eyelid and both the student and her brother said that their mom had done it.
- (f) On May 13, 1997 both the student and her twin brother had bruises, the student on the right side of her face above her eye and the brother on the right side of his neck.⁴

Objection: The parents object to this finding of fact, claiming that the log cannot be factual as the teacher recanted nine out of ten entries in the log in her testimony.

22. The student's early childhood development teacher complied with all state laws and the school's rules, regulations and policies.

Objection: The parents claim that the teacher's testimony was conflicting and that her actions are clearly in violation of Indiana Codes.

Conclusion of Law:

1. During the 1996-1997 school year the early childhood development teacher's feeding of the student breakfast, based upon the parents' notice of the free texts/meals and that the teacher never observed this student vomit (which negates any necessity to communicate to the parents the providing of free breakfasts to the student), did not make the student's educational program inappropriate.

³The parents' Petition for Review refers to Finding of Fact No. 5, (a) through (f). The BSEA considers that the objection was, in fact, made to Finding of Fact No. 11 (a)-(f), as Finding of Fact No. 5 does not have subparts and does not refer to the teacher's log, which is part of the parents' objection.

⁴This Finding of Fact is taken from the written decision concerning N.U. Finding of Fact No. 11 in the written decision concerning S.U. recites the same facts but from the point of view of S.U. rather than N.U.

Objection: The parents argue that this conclusion is not supported by the testimony. The parents were not notified at the fall conference as the parents were not in attendance at the fall conference.

The parents also argue that exhibits had been altered and the IHO did not address this issue after it was brought to his attention. Finally, the parents state “[C]onflict of interest and discrimination, that (school) employees, specifically (name) passed off as a mere oversight were in violation of Article seven.”

School's Response

In its response, the school reviews applicable standards of review and each of the parents' allegations in their petition. The School makes the following arguments:

1. There is nothing in the record which indicates that there was a violation of the separation of witnesses order.
2. Finding of Fact No. 6 indicates that the parents concurred in the IEPs, not that each parent attended each case conference committee meeting. This finding of parental concurrence in the IEPs is supported by the evidence.
3. The teacher testified both from memory and from her notes as to the findings in Finding of Fact No. 11 (a)-(f). The teacher's testimony was corroborated by other witnesses.
4. Finding of Fact No. 22 is supported by substantial evidence. It is unclear what law or procedure the parents believe was violated.
5. Conclusion of Law No. 1 is supported by substantial evidence.
6. There is no indication in the record, and the Petition for Review doesn't specify, what documents the parents believe were altered.
7. The record fails to reflect any conflict of interest and there is substantial evidence to show the Students and parents were not victims of discrimination.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on January 15, 1998, to conduct its review of the above-referenced matter. All members were present and had reviewed the record, the parents' Petition for Review and the school's Response. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.

2. Finding of Fact No. 6 indicates that the parents concurred in the IEP, not that each parent was present at each case conference. The IHO's Finding of Fact No. 6 is supported by substantial evidence.

3. Evidence and testimony indicate that the teacher observed injuries or bruises on the children. The IHO's Finding of Fact No. 11 is supported by substantial evidence.

4. Indiana law and the school's policy require that a teacher who has reason to believe that a child is a victim of child abuse or neglect shall make a report to Child Protective Services. The IHO's Finding of Fact No. 22 is supported by substantial evidence.

5. No evidence or testimony was presented to indicate that the provision of a free breakfast to the children in any way made their educational programs inappropriate. The IHO's Conclusion of Law No. 1 is supported by the evidence and the findings of fact.

6. A separation of witnesses order was made by the IHO. No objections were made during the course of the hearing to indicate a violation of this order, nor does the record indicate the presence of any witness during the testimony of another witness. Further, there is no evidence to indicate that any witness discussed his or her testimony with other witnesses.

7. 511 IAC 7-15-5(q) provides:

A verbatim record of the hearing shall be made and transcribed. The record shall be made available by the division of special education at no cost and upon the request of any party to the hearing. The hearing officer is responsible for ensuring the hearing is recorded or transcribed.

The parents do not allege, nor is there any evidence to suggest, that they made a request for a transcript from the division of special education and that their request was either denied or that the division of special education assessed a charge for the transcript.

8. Due process hearings conducted under Article 7 must be conducted pursuant to the provisions of 511 IAC 7-15-5 and Indiana Code 4-21.5-3 511 IAC 7-15-5(x). Indiana Code 4-21.5-3-1 requires that parties serve all motions, documents or other filed items on persons or the person's counsel or authorized representative of record in the proceeding. There is no violation of the parents' due process rights in requiring them to serve a copy of their brief on the opposing party. Indeed, it would be a violation of the opposing party's rights if the IHO did not assure that all parties received copies of all motions, briefs or other documents filed with the IHO.

9. The record fails to indicate that any exhibits were altered. The parents have failed to identify which exhibits they believe were altered, and no objections to the exhibits, based on the alleged alterations, were made at the time of the hearing.

10. Parental allegations of conflict of interest and discrimination on the part of school employees lack specificity and are unsupported by the record.

11. Due process procedures were followed.

All voted by the BSEA regarding the above were voice votes and were unanimous.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. Finding of Fact No. 6 of the IHO is upheld in all respects.
2. Finding of Fact No. 11 of the IHO is upheld in all respects.
3. Finding of Fact No. 22 of the IHO is upheld in all respects.
4. Conclusion of Law No. 1 of the IHO is upheld in all respects.
5. The decision of the IHO is upheld in all respects.
6. All other Motions not specifically addressed herein are hereby deemed denied.

Date: January 21, 1998

/s/ Richard Therrien
Richard Therrien, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).